



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF R-E-S-R- LLC

DATE: JAN. 29, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of healthcare professionals, seeks to employ the Beneficiary as a nurse supervisor. The Petitioner requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established its ability to pay the proffered wage to the Beneficiary and its other sponsored workers.

On appeal, the Petitioner states that the record demonstrates its ability to pay the proffered wages of all of its pending petitions based on the totality of the circumstances. It asserts that it has a reasonable expectation of an increase in business; that multiple pending petitions do not weaken its business; and that its bank statements and line of credit establish its ability to pay the proffered wage.

The Petitioner did not provide requested information regarding multiple other Form I-140 petitions that it has filed. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its Form I-140 beneficiaries. Upon *de novo* review, we will dismiss the appeal.

## I. LAW AND ANALYSIS

### A. Employment-Based Petitions for Schedule A Occupations

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

#### B. Ability to Pay the Proffered Wage

The Director denied the petition, concluding that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is \$96,950 per year. The priority date of the petition is October 12, 2016. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward.

We will next examine whether the Petitioner had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.<sup>1</sup>

The Petitioner's audited statement of operations for the 10-month period ending October 31, 2016, states net income of \$256,026.<sup>2</sup> The Petitioner's audited balance sheet for the same period states net current assets of \$699,294. However, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the

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<sup>1</sup> Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, \*5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

<sup>2</sup> The record indicates that the Petitioner is a limited liability company taxed as a partnership.

ability to pay the proffered wage to each beneficiary. See 8 C.F.R. § 204.5(g)(2); see also *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed dozens of Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or filed after the priority date of the current petition.<sup>3</sup>

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.<sup>4</sup>

In response to the Director's request for evidence to submit information on the other beneficiaries, the Petitioner did not provide requested information. On appeal, the Petitioner does not submit the requested information, but instead states that multiple pending petitions do not weaken its business. However, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, without information regarding the Petitioner's additional beneficiaries, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of the applicable beneficiaries.

On appeal, the Petitioner states that it has a reasonable expectation of an increase in business and asserts that the Beneficiary's proposed employment will increase the Petitioner's income. However, the Petitioner must demonstrate its ability to pay from the priority date onward. As the Beneficiary has not yet been employed by the Petitioner, any income from the Beneficiary's possible future employment cannot be considered for the years prior to that employment. Further, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

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<sup>3</sup> The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

<sup>4</sup> It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Moreover, in this case, the Petitioner has provided no evidence to show how the Beneficiary's employment as a nurse supervisor will significantly increase income for the Petitioner's business. The Petitioner asserts that it will make a profit of \$20,050 annually from employment of the Beneficiary, which is the difference between the amount of annual reimbursement the Petitioner stands to receive from [REDACTED] where the Beneficiary will be working, and the proffered wage.<sup>5</sup> However, the Petitioner has not calculated the additional costs (in addition to salary) in employing the Beneficiary, which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, and disability), paid leave benefits (vacations, holidays, sick, and personal leave), retirement and savings, and supplemental pay.<sup>6</sup> Therefore, the Petitioner has not established that the Beneficiary's proposed employment will increase the Petitioner's income.

On appeal, the Petitioner also asserts that we should consider its line of credit with Flushing Bank in our determination of its ability to pay the proffered wage. In calculating the ability to pay the proffered wage, we will generally not augment the Petitioner's net income or net current assets by adding in its lines of credit. A line of credit is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Moreover, without information regarding the Petitioner's additional beneficiaries, we cannot determine whether the unused funds from the line of credit are sufficient to cover the Petitioner's wage obligations.

Further, the Petitioner asserts that the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), is binding here. We disagree. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In addition, the decision in *Full Gospel* is distinguishable from this case. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a music teacher. Here, a line of credit is a debt and creates a liability on the Petitioner's

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<sup>5</sup> The staffing agreement between the Petitioner and [REDACTED] obligates the Petitioner to provide certain healthcare personnel to [REDACTED] including the positions of quality improvement coordinator, staff development coordinator, infection control coordinator, MDS coordinator, clinical care coordinator, registered nurse, and licensed practical nurse. The position of nursing supervisor is not included in the staffing agreement. In any future proceedings, the Petitioner must establish that its job offer to the Beneficiary is *bona fide*.

<sup>6</sup> The record does not include an employment agreement between the Petitioner and the Beneficiary showing what benefits, if any, the Beneficiary will receive.

balance sheet, whereas a parishioner's pledge is a promise to give money. The pledge does not create a liability. The Petitioner's line of credit does not establish its ability to pay the proffered wage.

The Petitioner also asserts that its bank statements establish its ability to pay the proffered wage. However, bank statements are not among the three types of evidence, listed in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise depicts an inaccurate financial picture of the Petitioner. The Petitioner also has not established that the funds reported on its bank statements show additional available funds that were not reflected on its financial statements, such as the Petitioner's taxable income (income minus deductions) or the cash specified on its audited balance sheet. Moreover, without information regarding the Petitioner's additional beneficiaries, we cannot determine whether the funds in the Petitioner's bank account are sufficient to cover the Petitioner's wage obligations.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the record indicates that the Petitioner was organized in 2009. While its gross income increased between 2013 and 2015, the record does not show its historical growth since its organization. The Petitioner has not indicated that it experienced any uncharacteristic business expenditures or losses. Further, the record does not establish the Petitioner's reputation in its industry, and it does not appear that the Beneficiary will be replacing a current employee or outsourced service. Also, as discussed above, without information regarding all of its I-140 beneficiaries, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of the applicable beneficiaries. Thus, assessing the totality of circumstances in this case, the record does not establish the Petitioner's continuing ability to pay the proffered wage.

The Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

### C. Notice in In-House Media

Although not addressed by the Director, the record does not establish whether the Petitioner properly published notice of the filing of a labor certification (Notice) internally using in-house media.

Petitions for Schedule A occupations must contain evidence establishing that the petitioner provided its U.S. workers with Notice prescribed by 20 C.F.R. § 656.10(d). A petitioner must provide Notice

to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted Notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).<sup>7</sup> In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). In addition, the Notice must be published “in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer’s organization.” *Id.* The satisfaction of the Notice requirement may be documented by “providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media” used to distribute the Notice. *Id.*

The regulation at 20 C.F.R. § 656.10(d) does not define “in-house media” or what sources in-house media would comprise. The DOL has stated that the “regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question.” U.S. DOL, OFLC Frequently Asked Questions and Answers, Notice of Filing, Question #13, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!177> (last visited Jan. 24, 2019). According to the DOL, the in-house posting contemplates internal notification of a petitioner’s employees rather than external notification to the public at large. Further, the in-house posting requirement relates to the petitioner’s “normal procedures used for the recruitment of similar positions in the employer’s organization.”<sup>8</sup> *Id.*

It is not clear whether the Petitioner complied with the in-house media requirement. The Petitioner’s posted Notice has a place for the Petitioner to indicate its “MEANS OF IN-HOUSE NOTICE, if applicable” or its “EXPLANATION OF ANY LACK OF IN-HOUSE NOTICE.” However, both of the entries were left blank on the posted Notice. The Petitioner has not established it properly published the Notice internally using in-house media as required by 20 C.F.R. § 656.10(d)(ii).

#### D. Beneficiary’s Qualifications

For Schedule A professional nurse petitions, a petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2). A petitioner must establish that this eligibility requirement was satisfied at the priority date. 8 C.F.R. § 103.2(b)(1). A beneficiary must also meet all of the requirements of the

<sup>7</sup> In this case, there is no evidence in the record of a bargaining representative for the occupation.

<sup>8</sup> If a petitioner normally recruits for similar positions in its organization through in-house media, then it must publish the notice of filing in its in-house media in accordance with its normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is of longer duration. U.S. DOL, OFLC Frequently Asked Questions and Answers, Notice of Filing, Question #7, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!171> (last visited Jan. 24, 2019).

offered position set forth on the labor certification by the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The Petitioner indicated on the petition and labor certification that the state of intended employment is New York. At Part H.14., the labor certification requires passage of the NCLEX-RN or a state registered nurse license.<sup>9</sup> The record contains the Beneficiary's State of Illinois registered nurse license, but it does not contain evidence of passage of the NCLEX-RN or a CGFNS certificate. While the labor certification does not indicate that the registered nurse license must be in the state of intended employment, registered nurses must be licensed and registered by the New York State Education Department in order to provide nursing services as a registered nurse in the state of New York.<sup>10</sup> Further, the regulation at 20 C.F.R. § 656.5(a)(2) requires a permanent, full and unrestricted license to practice professional nursing in the state of intended employment. Thus, the Petitioner has not established that the Beneficiary met the requirements of 20 C.F.R. § 656.5(a)(2) as of the priority date, as the record does not contain the Beneficiary's permanent, full and unrestricted license to practice professional nursing in New York. The Petitioner also has not established that the Beneficiary possessed the specific skills required by the labor certification as of the priority date.

## II. CONCLUSION

The Petitioner has not established its continuing ability to pay the Beneficiary because it has not demonstrated its ability to pay the proffered wages of all of its Form I-140 beneficiaries from the petition's priority date onward. It also has not established that it properly published the Notice internally using in-house media. It has also not established that the Beneficiary met the requirements of 20 C.F.R. § 656.5(a)(2) or had the specific skills required by the labor certification as of the priority date.

**ORDER:** The appeal is dismissed.

Cite as *Matter of R-E-S-R- LLC*, ID# 446163 (AAO Jan. 29, 2019)

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<sup>9</sup> The prevailing wage determination requires passage of the NCLEX-RN or a New York state registered nurse license.

<sup>10</sup> New York State Education Department, Office of the Professions, <http://www.op.nysed.gov/prof/nurse/nursing.htm> (last visited Jan. 24, 2019). New York and Illinois are not part of the nurse licensure compact, which allows nurses with a multistate license to practice nursing in their home state and other compact states.